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No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF ON THE MERITS FOR PETITIONER

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Respondent discovered the decision in *McCoy* v *Goldston,* 652 F.2d 654 (6th Cir. 1981), on August 24, 1981, and nine weeks later he has filed a supplemental brief arguing that the *Goldston* case has relevance here. Neither the tim-

ing of the brief (approximately one week before argument)[1] nor the case itself furthers respondent's position. Indeed, *McCoy* v. *Goldston* supports fully our argument that the state courts followed the constitutionally appropriate procedure (Brief for Petitioner: 23-34; Reply Brief for Petitioner: 6-11) and that the federal courts erred in granting habeas corpus relief.

Argument

The *Goldston* case, *supra,* was a civil rights action in which plaintiffs sued individual Detroit police officers, as well as the city police department itself. After a verdict was returned against plaintiffs, it was discovered that on voir dire a juror had failed to disclose that her son was about to complete a training program and become a parole officer. The juror failed to make this disclosure even though the trial judge asked prospective jurors whether ". . . any of you have any close friends or relatives who are connected or associated with any law enforcement agency or police department." 652 F.2d at 656.

Given the juror's failure to disclose this fact on voir dire, the Court of Appeals for the Sixth Circuit remanded the case to the district court for an evidentiary hearing at which the juror would testify. The circuit court directed that at

1. To be sure, Rule 35.5 of the Rules of this Court (not Rule 22.6 cited by respondent) permits the filing of a supplemental brief on the merits to bring new authority to the attention of the Court, no later than one week before argument. Still, it is difficult to believe that this rule is designed to permit the filing of a brief one week before argument when that brief is based upon a case discovered nine weeks prior to filing.

the conclusion of that hearing, the district court should order a new trial if: (1) the juror "deliberately concealed information or gave a purposefully incorrect answer;" or (2) "the juror admits a feeling of partiality;" or (3) "the judge makes a pragmatic judgment that there is a substantial possibility of the juror unconsciously favoring one side or another." 652 F.2d at 659.

Despite respondent's reliance on *Goldston*, that case clearly and unequivocally supports our position that here the post trial procedures in state court were constitutionally appropriate. The state trial judge held the very kind of evidentiary hearing ordered in *Goldston*. At the conclusion of that hearing, the state judge determined that: (1) juror Smith had not deliberately concealed his job application for a position with the District Attorney's Office; (2) Smith had convincingly denied any feeling of partiality; and (3) there was no substantial possibility that the job application affected Smith consciously or subconsciously; indeed, the state judge was satisfied beyond a reasonable doubt that Smith was impartial.[2]

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2. At pages 2-3 of the Supplemental Brief, respondent argues that because the juror sent a letter and resume to the prosecutor, he must be conclusively presumed biased under the doctrine of implied bias established by *United States* v. *Wood*, 299 U. S. 123 (1936). But, as we have shown previously (Brief for Petitioner, pp. 43-44; Reply Brief for Petitioner, pp. 12-13), *Wood* stands for the opposite proposition: the Constitution requires no challenge for cause based upon a conclusive presumption of bias merely because of a potential juror's employment by the government even if he or she is employed by an agency having a special interest in the case. 299 U. S. at 149-50. Rather, *Wood* holds that the Constitution requires only challenges for cause based upon a showing of actual bias. *Id.* The *Wood* decision has clearly demarked the governing constitutional principle for forty-five years, and respondent offers no reason to depart from that clear demarcation.

Notably, in discussing the *Goldston* case, respondent mentions only that the Sixth Circuit Court of Appeals reversed for "appropriate proceedings" (Supplemental Brief: 2), omitting to say that the appropriate proceeding ordered was a post trial evidentiary hearing. 652 F.2d at 657. By this omission, respondent seemingly recognizes that the ordering of a post trial hearing in *Goldston* is fatal to his claim that a similar state hearing was constitutionally inadequate. Avoiding the Sixth Circuit's recognition of a post trial hearing's efficacy, respondent argues that the prosecutor deliberately concealed the juror's letter and resume and that this failure requires a new trial under the rationale of *Goldston.*

The Sixth Circuit wrote that if, after the evidentiary hearing, it was found that the juror deliberately failed to disclose at voir dire, such a finding would require a new trial. 652 F.2d at 659. Certainly, if a juror lies about a fact and that lie is made for the very purpose of avoiding a peremptory challenge, then it seems fair to infer that that juror has a state of mind which precludes her or him from being fair and impartial. Of course, here the trial judge found that juror Smith neither lied at voir dire, nor deliberately concealed sending the letter and resume to the District Attorney's Office during trial. Notably, in the Supplemental Brief, respondent does not challenge these findings. Rather, as noted above, he tries to equate the prosecutor's "deliberate concealment" at trial with the *Goldston* juror's "deliberate concealment."

In the first place, the state judge found that there was no deliberate concealment, *i.e.*, no effort to secure an unfair advantage, on the part of the prosecutor. Appendix E to

Petition for Certiorari: 39a-40a; *see* Reply Brief for Petitioner: 5. In the second place, and perhaps more importantly, a potential juror who deliberately conceals relevant information may well demonstrate his or her unfitness to serve as a juror. In contrast, while a prosecutor who deliberately conceals the same facts may demonstrate his or her unfitness, surely the prosecutor's failure to disclose does not demonstrate the juror's unfitness. Put simply, the prosecutor's failure to disclose the juror's letter did not prejudice respondent because a post trial hearing like the one ordered in *Goldston* was still available to determine whether juror Smith was biased.

Relying on *Goldston,* respondent attempts to create prejudice by again arguing that if the prosecutor had disclosed the juror's application during trial, the state judge "would undoubtedly have" replaced that juror with an alternate then available. Supplemental Brief: 3.[3] Respondent then argues that the prosecutor's failure to disclose made replacement impossible and that a new trial is the only satisfactory remedy. This argument, based as it is on *Goldston,* is fatally flawed because in *Goldston* the juror's failure to disclose during voir dire prevented plaintiff from exercising a peremptory challenge. Still, the Sixth Circuit ordered an evidentiary hearing, not a new trial.

If that hearing was adequate in *Goldston* to protect the right to an impartial jury, then it must also be adequate here, unless a different result is necessary to punish the

3. This speculation about what the state trial judge would have done is in conflict with that judge's thoughts in this regard. Appendix E to Petition for Certiorari: 56a (opinion of trial judge).

state prosecutor for a "serious," "unique misjudgment." Appendix E to Petition for Certiorari: 52a, 57a (opinion of state trial judge). However, this Court has unequivocally held that, absent prejudice to an accused (and here the post trial hearing shows there is none), improper prosecutorial conduct is not a basis for interfering in a state criminal prosecution and granting federal habeas corpus relief. *See* Brief for Petitioner: 31-34 (authorities cited).

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In sum, after a full, complete and fair hearing, the state judge found no bias or misconduct on the part of the juror. A similar finding in the *Goldston* case would end that federal case. Here, the state case should have been treated the same way.

Respectfully submitted,

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November 2, 1981